

AGE DISCRIMINATION - SOME CURRENT ISSUES

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In the pages that follow, I focus on some of the current practical problems that we could face in our every day practice in relation to age discrimination in connection with employment. I have tried to focus as much as possible on the legal structure or the possible application of the law.

The Provisions and their Implementation in Malta

Prior to May 2004, when Malta became a member of the European Union, the Maltese government began the process by means of which the provisions of various directives, including Council Directive 2000/78¹ which states in paragraph 25 of its preamble that

“the prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce.”

The Preamble then continues: “However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.”

Article 1 of the Directive then goes on to clearly state that the purpose of the directive is to lay down a general framework for combatting discrimination on a number of grounds including that of age.

As a result of the implementation exercise, the prohibition of discrimination on the basis of age was therefore indirectly introduced in the definition of ‘discrimination’ and in the general anti-discrimination provisions found in the Employment and Industrial Relations Act of 2002². These general provisions were then complemented by Article 1(3) and 5 of

¹ Adopted under Article 13 of the Treaty establishing the European Community

² Chapter 452 of the Laws of Malta

the Equal Treatment in Employment Regulations of 2004³ which deal specifically with age discrimination.

Evidently, employers and employees will be quite curious if not eager to understand the scope and purport of these provisions. Although not much publicity has been given to these provisions, their far-reaching scope and the uncertainty surrounding their implementation makes these provisions worth noting.

Both the Directive and the Maltese Regulations were in fact drafted in an attempt to curb both direct and indirect discrimination on the grounds of age. Direct discrimination occurs when an adverse decision is made on the basis of a person's age or perceived age. Indirect discrimination happens when a policy or practice applies to everyone but causes disadvantage to a certain group (such as younger or older people) unless there are good reasons for that policy or practice.

A first reading of the principle of non-discrimination therefore begs a number of questions; can an employer decide to advertise for a post quoting an age requirement? What about an age limit? Can an employer provide certain employment benefits which are gained by the employee upon reaching a certain age? Indeed, are the provisions of the Social Security Act on pensionable age illegal in terms of European Law?

The European legislator attempted to answer some of these questions by means of Article 6 of the European Directive entitled 'Justification of differences of treatment on grounds of age'. Article 5 of the Equal Treatment in Employment Regulations is in fact a replica of the provisions of Article 6(1) of the Directive which states,

"differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

- (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;
- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."

³ LN 461 of 2004

The above provisions are of course vague and potentially far-reaching. A first reading of the provisions leaves employers, employees and lawyers thinking that employers could do all they like and that these provisions will not really curb their every day practices.

Government is safeguarded further as Paragraphs 13 and 14 of the recitals of the Directive clearly state that the Directive “does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.” And that the Directive “shall be without prejudice to national provisions laying down retirement ages”. Moreover, occupational pension scheme provisions are also excluded by means of Article 6(2) of the Directive as long as they are not discriminatory on the basis of sex.

There is however, in this regard, a problem of implementation. Our legislator has decided to replicate the provisions of the Directive which seem to be directed at the Member State and not at the private employer. The wording of Article 6(1) of the Directive is such that it is directed at Member States (including of course Malta) which should “within the context of national law”, legislate according to the principles. *It is submitted that simply copying the provisions of the directive and directing the provisions of the Directive to the private employer within the context of the Equal Treatment in Employment Regulations without expanding on, or indeed implementing, these principles is a far too “easy” a way of drafting local legislation.* Such drafting in fact, will undoubtedly lead the way to incorrect interpretations and long-winded debates which could have easily been solved by legislating in a more detailed manner.

Age Discrimination and Dismissal

The practical problems that can crop up and the kind of cases with which the Industrial Tribunal may be faced with regard to age discrimination can be various. The problems will be most evident in the area of dismissal. Will the redundancy criterion of ‘last in - first out’ which has been present in our law for a number of years be declared illegal because it is potentially discriminatory against younger workers who are less likely to have built up a significant length of service? Perhaps Malta will have to get used to a system which is less protectionist and which is based on numerous, less discriminatory, criteria such as skills, experience and performance.

What about the proviso to Section 36(14) of the Employment and Industrial Relations Act which states that “...an employer can terminate the employment of an employee when the employee reaches retirement age as defined in the Social Security Act.”

The provision refers to the national social security system which per se is exempted, but are private employers or indeed the government as an employer exempted from discriminating against a person by dismissing that person because he or she has reached retirement age? Indeed, the EU Employment Policy over the last few years has invited Member States and

the social partners to develop a policy in order to permit employers to keep older workers rather than legislate in order to make it legitimate to dismiss older workers.⁴

Age Discrimination and Recruitment

Another aspect which will be of vital importance is the recruitment stage of employment. This area will be the most difficult. Can we imagine what would happen if Maltese employers keep using terms such as ‘young’, ‘energetic’, ‘dynamic’, ‘mature’, ‘graduated in the last seven years’ or ‘a minimum of ten years’ experience in their advertisements? Employers will of course argue that these terms are more than legitimate but it will be interesting to see how our courts will interpret these advertisements in the light of EU developments. Interestingly, the European Courts have tended to think twice before declaring that a selection procedure which included an age limit was in fact discriminatory.⁵

Conclusion

The above problems are only but a few of the questions that will begin to cross our minds as the legislation begins to be tested. Unfortunately, the government has implemented this and other legislation without a proper explanation of the intended coverage or scope of these provisions so at the moment we can only look out for decisions of the European Court of Justice for guidance.

⁴ On this point, vide written question E-3022/02 by Joke Swiebel (PSE) to the Commission - *Official Journal* 110 E, 08/05/2003 P. 0152 - 0153

⁵ Vide Case T-256/01 Norman Pyres v Commission of the EC (15th February 2005)